

time the participant applies for benefit payments.

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§ 1.401(a)-21 Rules relating to the use of an electronic medium to provide applicable notices and to make participant elections.

(a) *Introduction*—(1) *In general*—(i) *Permission to use an electronic medium.* This section provides rules relating to the use of an electronic medium to provide applicable notices and to make participant elections as defined in paragraph (e)(1) and (6) of this section with respect to retirement plans, employee benefit arrangements, and individual retirement plans described in paragraph (a)(2) of this section. The rules in this section reflect the provisions of the Electronic Signatures in Global and National Commerce Act, Public Law 106-229 (114 Stat. 464 (2000) (E-SIGN)).

(ii) *Notices and elections required to be in writing or in written form*—(A) *In general.* The rules of this section must be satisfied in order to use an electronic medium to provide an applicable notice or to make a participant election if the notice or election is required to be in writing or in written form under the Internal Revenue Code, Department of Treasury regulations, or other guidance issued by the Commissioner.

(B) *Rules relating to applicable notices.* An applicable notice that is provided using an electronic medium is treated as being provided in writing or in written form if and only if the requirements of paragraph (a)(5) of this section are satisfied and either the consumer consent requirements of paragraph (b) of this section or the requirements for exemption from the consumer consent requirements under paragraph (c) of this section are satisfied. For example, in order to provide a section 402(f) notice electronically, a qualified plan must satisfy either the consumer consent requirements of paragraph (b) of this section or the requirements for exemption under paragraph (c) of this section. If a plan fails to satisfy either of these requirements,

the plan must provide the section 402(f) notice using a written paper document in order to satisfy the requirements of section 402(f).

(C) *Rules relating to participant elections.* A participant election that is made using an electronic medium is treated as being provided in writing or in written form if and only if the requirements of paragraphs (a)(5) and (d) of this section are satisfied.

(iii) *Safe harbor method for applicable notices and participant elections that are not required to be in writing or written form.* For an applicable notice or a participant election that is not required to be in writing or in written form, the rules of this section provide a safe harbor method for using an electronic medium to provide the applicable notice or to make the participant election.

(2) *Application of rules*—(i) *Notices, elections, or consents under retirement plans.* The rules of this section apply to any applicable notice or any participant election relating to the following retirement plans: A qualified retirement plan under section 401(a) or 403(a); a section 403(b) plan; a simplified employee pension (SEP) under section 408(k); a simple retirement plan under section 408(p); or an eligible governmental plan under section 457(b).

(ii) *Notices, elections, or consents under other employee benefit arrangements.* The rules of this section also apply to any applicable notice or any participant election relating to the following employee benefit arrangements: An accident and health plan or arrangement under sections 104(a)(3) and 105; a cafeteria plan under section 125; an educational assistance program under section 127; a qualified transportation fringe program under section 132; an Archer MSA under section 220; or a health savings account under section 223.

(iii) *Notices, elections, or consents under individual retirement plans.* The rules of this section also apply to any applicable notice or any participant election relating to individual retirement plans, including a Roth IRA under section 408A; or a deemed IRA under a qualified employer plan described in section 408(q).

(3) *Limitation on application of rules*—(i) *In general.* The rules of this section

do not apply to any notice, election, consent, disclosure, or obligation required under the provisions of title I or IV of the Employee Retirement Income Security Act of 1974, as amended (ERISA), over which the Department of Labor or the Pension Benefit Guaranty Corporation has interpretative and enforcement authority. For example, the rules in 29 CFR 2520.104b-1 of the Department of Labor Regulations apply with respect to an employee benefit plan providing disclosure documents, such as a summary plan description or a summary annual report. The rules in this section also do not apply to Internal Revenue Code section 411(a)(3)(B) (relating to suspension of benefits), Internal Revenue Code section 4980B(f)(6) (relating to an individual's COBRA rights), or any other Internal Revenue Code provision over which Department of Labor or the Pension Benefit Guaranty Corporation has similar interpretative authority.

(ii) *Recordkeeping and other requirements.* The rules in this section only apply with respect to applicable notices and participant elections relating to an individual's rights under a retirement plan, an employee benefit arrangement, or an individual retirement plan. Thus, the rules in this section do not alter the otherwise applicable requirements under the Internal Revenue Code, such as the requirements relating to tax reporting, tax records, or substantiation of expenses. See section 6001 for rules relating to the maintenance of records, statements, and special returns. See also section 101(e) of E-SIGN, which provides that if an electronic record of an applicable notice or a participant election is not maintained in a form that is capable of being retained and accurately reproduced for later reference, then the legal effect, validity, or enforceability of such electronic record may be denied.

(4) *General requirements related to applicable notices and participant elections.* The rules of this section supplement the general requirements related to each applicable notice and participant election. Thus, in addition to satisfying the rules for timing and content, the rules in this section must be satisfied.

(5) *Requirements related to the design of an electronic system used to deliver applicable notices and to make participant elections—*(i) *The electronic system must take into account the content of a notice.* With respect to the content of an applicable notice, the electronic system must be reasonably designed to provide the information in the notice to a recipient in a manner that is no less understandable to the recipient than a written paper document.

(ii) *Identification of the significance of information in the notice.* The electronic system must be designed to alert the recipient, at the time an applicable notice is provided, to the significance of the information in the notice (including identification of the subject matter of the notice), and provide any instructions needed to access the notice, in a manner that is readily understandable.

(b) *Consumer consent requirements—*(1) *Requirements.* With respect to an applicable notice, the consumer consent requirements of this paragraph (b) are satisfied if—

(i) The requirements in paragraphs (b)(2) through (4) of this section are satisfied; and

(ii) In accordance with section 101(c)(6) of E-SIGN, the applicable notice is not provided through the use of oral communication or a recording of an oral communication.

(2) *Consent—*(i) *In general.* The recipient must affirmatively consent to the delivery of the applicable notice using an electronic medium. This consent must be either—

(A) Made electronically in a manner that reasonably demonstrates that the recipient can access the applicable notice in the electronic medium in the form that will be used to provide the notice; or

(B) Made using a written paper document (or using another form not described in paragraph (b)(2)(i)(A) of this section), but only if the recipient confirms the consent electronically in a manner that reasonably demonstrates that the recipient can access the applicable notice in the electronic medium in the form that will be used to provide the notice.

(ii) *Withdrawal of consumer consent.* The consent to receive electronic delivery requirement of this paragraph

(b)(2) is not satisfied if the recipient withdraws his or her consent before the applicable notice is delivered.

(3) *Required disclosure statement.* The recipient, prior to consenting under paragraph (b)(2)(i) of this section, must be provided with a clear and conspicuous statement containing the disclosures described in paragraphs (b)(3)(i) through (v) of this section:

(i) *Right to receive paper document—*

(A) *In general.* The statement informs the recipient of any right to have the applicable notice be provided using a written paper document or other non-electronic form.

(B) *Post-consent request for paper copy.* The statement informs the recipient how, after having provided consent to receive the applicable notice electronically, the recipient may, upon request, obtain a paper copy of the applicable notice and whether any fee will be charged for such copy.

(ii) *Right to withdraw consumer consent.* The statement informs the recipient of the right to withdraw consent to receive electronic delivery of an applicable notice on a prospective basis at any time and explains the procedures for withdrawing that consent and any conditions, consequences, or fees in the event of the withdrawal.

(iii) *Scope of the consumer consent.* The statement informs the recipient whether the consent to receive electronic delivery of an applicable notice applies only to the particular transaction that gave rise to the applicable notice or to other identified transactions that may be provided or made available during the course of the parties' relationship. For example, the statement may provide that a recipient's consent to receive electronic delivery will apply to all future applicable notices of the recipient relating to the employee benefit arrangement until the recipient is no longer a participant in the employee benefit arrangement (or withdraws the consent).

(iv) *Description of the contact procedures.* The statement describes the procedures to update information needed to contact the recipient electronically.

(v) *Hardware or software requirements.* The statement describes the hardware and software requirements needed to access and retain the applicable notice.

(4) *Post-consent change in hardware or software requirements.* If, after a recipient provides consent to receive electronic delivery, there is a change in the hardware or software requirements needed to access or retain the applicable notice and such change creates a material risk that the recipient will not be able to access or retain the applicable notice in electronic format—

(i) The recipient must receive a statement of—

(A) The revised hardware or software requirements for access to and retention of the applicable notice; and

(B) The right to withdraw consent to receive electronic delivery without the imposition of any fees for the withdrawal and without the imposition of any condition or consequence that was not previously disclosed in paragraph (b)(3) of this section; and

(ii) The recipient must reaffirm consent to receive electronic delivery in accordance with the requirements of paragraph (b)(2) of this section.

(c) *Exemption from consumer consent requirements—*(1) *In general.* This paragraph (c) is satisfied if the conditions in paragraphs (c)(2) and (3) of this section are satisfied. This paragraph (c) constitutes an exemption from the consumer consent requirements of section 101(c) of E-SIGN pursuant to the authority granted in section 104(d)(1) of E-SIGN.

(2) *Effective ability to access.* For purposes of this paragraph (c), the electronic medium used to provide an applicable notice must be a medium that the recipient has the effective ability to access.

(3) *Free paper copy of applicable notice.* At the time the applicable notice is provided, the recipient must be advised that he or she may request and receive the applicable notice in writing on paper at no charge, and, upon request, that applicable notice must be provided to the recipient at no charge.

(d) *Special rules for participant elections—*(1) *In general.* This paragraph (d) is satisfied if the conditions described in the following paragraphs (d)(2) through (6) are satisfied:

(2) *Effective ability to access.* The electronic medium under an electronic system used to make a participant election must be a medium that the person

who is eligible to make the election is effectively able to access. If the appropriate individual is not effectively able to access the electronic medium for making the participant election, the participant election will not be treated as made available to that individual. Thus, for example, the participant election will not be treated as made available to that individual for purposes of the rules under section 401(a)(4).

(3) *Authentication.* The electronic system used in making participant elections is reasonably designed to preclude any person other than the appropriate individual from making the election. Whether this condition is satisfied is based on facts and circumstances, including whether the participant election has the potential for a conflict of interest between the individuals involved in the election. See *Examples 3, 4, and 5* of paragraph (f) of this section for illustrations of electronic systems that satisfy the authentication requirement of this paragraph (d)(3).

(4) *Opportunity to review.* The electronic system used in making participant elections provides the person making the participant election with a reasonable opportunity to review, confirm, modify, or rescind the terms of the election before the election becomes effective.

(5) *Confirmation of action.* The person making the participant election receives, within a reasonable time, a confirmation of the effect of the election under the terms of the plan or arrangement through either a written paper document or an electronic medium under a system that satisfies the requirements of either paragraph (b) or (c) of this section (as if the confirmation were an applicable notice).

(6) *Participant elections, including spousal consents, that are required to be witnessed by a plan representative or a notary public—(i) In general.* In the case of a participant election which is required to be witnessed by a plan representative or a notary public (such as a spousal consent under section 417), the signature of the individual making the participant election is witnessed in the physical presence of a plan representative or a notary public.

(ii) *Electronic notarization permitted.* If the requirements of paragraph (d)(6)(i) of this section are satisfied, an electronic notarization acknowledging a signature (in accordance with section 101(g) of E-SIGN and State law applicable to notary publics) will not be denied legal effect if the signature of the individual is witnessed in the physical presence of a notary public.

(iii) *Delegation to Commissioner.* In guidance published in the Internal Revenue Bulletin, the Commissioner may provide that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement under paragraph (d)(6)(i) of this section, but only if those procedures with respect to the electronic system provide the same safeguards for participant elections as are provided through the physical presence requirement. See § 601.601(d)(2)(ii)(b) of this chapter.

(e) *Definitions.* The definitions in this paragraph (e) apply for purposes of this section.

(1) *Applicable notice.* The term *applicable notice* includes any notice, report, statement, or other document required to be provided to a recipient under a retirement plan, employee benefit arrangement, or individual retirement plan as described in paragraph (a)(2) of this section.

(2) *Electronic.* The term *electronic* means technology having electrical, digital, magnetic, wireless, optical, electromagnetic, voice-recording systems, or similar capabilities.

(3) *Electronic medium.* The term *electronic medium* means an electronic method of communication (e.g., Web site, electronic mail, telephonic system, magnetic disk, and CD-ROM).

(4) *Electronic record.* The term *electronic record* means an applicable notice or a participant election that is created, generated, sent, communicated, received, or stored by electronic media.

(5) *Electronic system.* The term *electronic system* means a system designed for creating, generating, sending, receiving, storing, retrieving, displaying, or processing information that makes use of any electronic medium.

(6) *Participant election.* The term *participant election* includes any consent,

election, request, agreement, or similar communication made by or from a participant, beneficiary, alternate payee, or an individual entitled to benefits under a retirement plan, employee benefit arrangement, or individual retirement plan as described in paragraph (a)(2) of this section.

(7) *Recipient.* The term *recipient* means a plan participant, beneficiary, employee, alternate payee, or any other person to whom an applicable notice is to be provided.

(f) *Examples.* The following examples illustrate the rules of this section. *Examples 1, 2, 3, and 6* assume that the requirements of paragraph (a)(4) and (5) of this section are satisfied.

Example 1. (i) *Facts involving using the consumer consent requirements to deliver a section 402(f) notice via e-mail.* Plan A, a qualified plan, permits participants to request benefit distributions from the plan on Plan A's Internet Web site. Under Plan A's system for such transactions, a participant must enter his or her account number, personal identification number (PIN), and his or her e-mail address to which the notice is to be sent. The participant's PIN and account number must match the information in Plan A's records in order for the transaction to proceed. Participant H requests a distribution from Plan A on Plan A's Web site, and, at the time of the request for distribution, a disclosure statement appears on the computer screen that explains that Participant H can consent to receive the section 402(f) notice electronically. The disclosure statement provides information relating to the consent, including how to receive a paper copy of the notice, how to withdraw consent, the hardware and software requirements, and the procedures for accessing the section 402(f) notice, which is in a file format from a specific spreadsheet program. After reviewing the disclosure statement, which satisfies the requirements of paragraph (b)(3) of this section, Participant H consents to receive the section 402(f) notice via e-mail by selecting the consent button at the end of the disclosure statement. As a part of the consent procedure, an e-mail is sent to Participant H's e-mail address in order to demonstrate that Participant H can access the spreadsheet program. In the e-mail, Participant H is prompted to answer a question from the spreadsheet program, which is in an attachment to the e-mail. Once Participant H correctly answers the question, the section 402(f) notice is then delivered to Participant H via e-mail.

(ii) *Conclusion.* In this *Example 1*, Plan A's delivery of the section 402(f) notice to Participant H satisfies the requirements of paragraph (b) of this section.

Example 2. (i) *Facts—(A) Facts involving using the alternative method to deliver a section 411(a)(11) notice via e-mail.* Plan B, a qualified plan, permits participants to request benefit distributions from the plan on Plan B's Internet Web site. Under Plan B's system for such transactions, a participant must enter his or her account number and personal identification number (PIN), and his or her e-mail address to which the notice is to be sent. The participant's PIN and account number must match the information in Plan B's records in order for the transaction to proceed. After Participant K, a single employee, requests a distribution from Plan B on Plan B's Internet Web site, the plan administrator provides Participant K with a section 411(a)(11) notice in an attachment to an e-mail. Plan B sends the e-mail with a request for a computer generated notification that the message was received and opened. The e-mail instructs Participant K to read the attachment for important information regarding the request for a distribution. In addition, the e-mail also states that Participant K may request the section 411(a)(11) notice on a written paper document and that, if Participant K requests the notice on a written paper document, it will be provided at no charge. Plan B receives notification indicating that the e-mail was received and opened by Participant K.

(B) *Facts involving making a participant's consent to a distribution.* In order to consent to a distribution, Plan B requires a participant to enter the participant's account number and PIN in order to preclude any person other than the participant from making the election. After the authentication process, Participant K completes a distribution request form on the Web site. After completing the request form, the Web site provides a summary of the information entered on the form and gives Participant K an opportunity to review or modify the distribution request form before the transaction is completed. Within a reasonable period of time after Participant K consents to the distribution, the plan administrator, by e-mail, sends confirmation of the terms (including the form) of the distribution to Participant K and advises Participant K that, upon request, the confirmation may be provided to Participant K on a written paper document at no charge. Plan B retains an electronic copy of the consent to the distribution in a form that is capable of being retained and accurately reproduced for later reference by Participant K.

(ii) *Conclusion.* In this *Example 2*, Plan B's delivery of the section 411(a)(11) notice and the electronic system used to make Participant K's consent to a distribution satisfy the requirements of paragraphs (a), (c), and (d) of this section.

Example 3. (i) *Facts involving the transmission of a spousal consent via electronic notarization.* Plan C, a qualified money purchase

pension plan, permits a married participant to request a plan loan through the Plan C's Internet Web site with the notarized consent of the spouse. Under Plan C's system for requesting a plan loan, a participant must enter his or her account number, personal identification number (PIN), and his or her e-mail address. The information entered by the participant must match the information in Plan C's records in order for the transaction to proceed. Participant M, a married participant, is effectively able to access the Web site available to apply for a plan loan. In order to apply for a loan, Plan C requires a participant to enter the participant's account number and PIN in order to preclude any person other than the participant from making the election. Participant M completes the loan application on Plan C's Web site. Within a reasonable period of time after submitting the plan loan application, the plan administrator, by e-mail, sends Participant M the loan application, including all attachments setting forth the terms of the loan agreement and all other required information. In the e-mail, Plan C also notifies Participant M that, upon request, the loan application may be provided to Participant M on a written paper document at no charge. Plan C then instructs Participant M that, in order for the loan application to proceed, Participant M must submit to the plan administrator a notarized spousal consent form. Participant M and M's spouse go to a notary public and the notary witnesses Participant M's spouse signing the spousal consent for the loan agreement on an electronic signature capture pad with adequate security. After witnessing M's spouse signing the spousal consent, the notary public sends an e-mail with an electronic acknowledgement that is attached to or logically associated with the signature of M's spouse to the plan administrator. The electronic acknowledgement is in accordance with section 101(g) of E-SIGN and the relevant State law applicable to notary publics. After the plan receives the e-mail, Plan C sends an e-mail to Participant M, giving M a reasonable period to review and confirm the completed loan application and to determine whether the loan application should be modified or rescinded. In addition, the e-mail to Participant M also provides that M may request the completed loan application on a written paper document and that, if M requests the written paper document, it will be provided at no charge. Plan C retains an electronic copy of the loan agreement, including the spousal consent, in a form that is capable of being retained and accurately reproduced for later reference by all parties.

(ii) *Conclusion.* In this *Example 3*, the transmission of the plan loan agreement satisfies the requirements of paragraphs (a), (c), and (d) of this section. By requiring that the spouse sign the spousal consent on an elec-

tronic signature capture pad in the physical presence of a notary public, the electronic system satisfies the requirement that the system be reasonably designed to preclude any person other than the appropriate individual from making the election. Thus, the electronic notarization of spousal consent satisfies the requirements of paragraphs (a) and (d) of this section.

Example 4. (i) *Facts—(A) Facts involving using the alternative method of compliance to deliver a section 411(a)(11) notice via an automated telephone system.* A qualified profit-sharing plan (Plan D) permits participants to request distributions through an automated telephone system. Under Plan D's system for such transactions, a participant must enter his or her account number and personal identification number (PIN); this information must match the information in Plan D's records in order for the transaction to proceed. Plan D provides only the following distribution options: single-sum payment; and annual installments over 5, 10, or 20 years. Participant N, a single participant, requests a distribution from Plan D by following the applicable instructions on the automated telephone system. After Participant N has requested the distribution, the automated telephone system recites the section 411(a)(11) notice over the phone. The automated telephone system also advises Participant N that, upon request, the notice may be provided on a written paper document and that, if Participant N so requests, the notice will be provided on a written paper document at no charge.

(B) *Facts involving making a participant's consent to a distribution via an automated telephone system.* In order to consent to a distribution, Plan D requires a participant to enter the participant's account number and PIN in order to preclude any person other than the participant from making the election. Participant N requests a distribution by entering information on the automated telephone system. After completing the request, the automated telephone system provides an oral summary of the information entered and gives Participant N an opportunity to review or modify the distribution request before the transaction is completed. Plan D's automated telephone system confirms the distribution request to Participant N and advises Participant N that, upon request, a confirmation may be provided on a written paper document at no charge. Plan D retains an electronic copy of the consent to the distribution in a form that is capable of being retained and accurately reproduced for later reference by Participant N.

(ii) *Conclusion.* In this *Example 4*, because Plan D has relatively few and simple distribution options, the provision of the section 411(a)(11) notice through the automated telephone system is no less understandable

to the participant than a written paper notice for purposes of paragraph (a)(5)(i) of this section. In addition, the automated telephone procedures of Plan D satisfy the applicable requirements of paragraphs (a), (c), and (d) of this section.

Example 5. (i) *Facts.* Same facts as *Example 4* of this paragraph (f), except that, pursuant to Plan D's system for processing such transactions, a participant who so requests is transferred to a customer service representative whose conversation with the participant is recorded. The customer service representative provides the section 411(a)(11) notice from a prepared text and processes the participant's distribution in accordance with the predetermined instructions from the plan administrator.

(ii) *Conclusion.* As in *Example 4* of this paragraph (f), because Plan D has relatively few and simple distribution options, the provision of the section 411(a)(11) notice through the automated telephone system is no less understandable to the participant than a written paper notice for purposes of paragraph (a)(4) of this section. Further, in this *Example 5*, the customer service telephone procedures of Plan D satisfy the requirements of paragraphs (a), (c), and (d) of this section.

Example 6. (i) *Facts.* Plan E, a qualified plan, permits participants to request distributions by e-mail on the employer's e-mail system. Under this system, a participant must enter his or her account number, personal identification number (PIN), and e-mail address. This information must match that in Plan E's records in order for the transaction to proceed. If a participant requests a distribution by e-mail, the plan administrator provides the participant with a section 411(a)(11) notice by e-mail. The plan administrator also advises the participant by e-mail that he or she may request the section 411(a)(11) notice on a written paper document and that, if the participant requests the notice on a written paper document, it will be provided at no charge. Participant Q requests a distribution and receives the section 411(a)(11) notice from the plan administrator by reply e-mail. However, before Participant Q elects a distribution, Q terminates employment. Following termination of employment, Participant Q no longer has access to the employer's e-mail system.

(ii) *Conclusion.* In this *Example 6*, Plan E does not satisfy the participant election requirements under paragraph (d) of this section because Participant Q is not effectively able to access the electronic medium used to make the participant election. Plan E must provide Participant Q with the opportunity to make the participant election through a written paper document or another system that Participant Q is effectively able to access, such as the automated telephone sys-

tems described in *Example 4* and *Example 5* of this paragraph (f).

(g) *Effective date.* The rules provided in this section apply to applicable notices provided, and to participant elections made, on or after January 1, 2007. However, a retirement plan, an employee benefit arrangement, or an individual retirement plan that provides an applicable notice or makes a participant election that complies with the requirements set forth in these regulations on or after October 1, 2000, and before January 1, 2007, will not be treated as failing to provide an applicable notice or to make a participant election merely because the notice or election was not in writing or written form.

[T.D. 9294, 71 FR 61883, Oct. 20, 2006]

§ 1.401(a)-30 Limit on elective deferrals.

(a) *General Rule.* A trust that is part of a plan under which elective deferrals may be made during a calendar year is not qualified under section 401(a) unless the plan provides that the elective deferrals on behalf of an individual under the plan and all other plans, contracts, or arrangements of the employer maintaining the plan may not exceed the applicable limit for the individual's taxable year beginning in the calendar year. A plan may incorporate the applicable limit by reference. In the case of a plan maintained by more than one employer to which section 413 (b) or (c) applies, section 401(a)(30) and this section are applied as if each employer maintained a separate plan. See § 1.402(g)-1(e) for rules permitting the distribution of excess deferrals to prevent disqualification of a plan or trust for failure to comply in operation with section 401(a)(30).

(b) *Definitions.* For purposes of this section:

(1) *Applicable limit.* The term "applicable limit" has the meaning provided in § 1.402(g)-1(d).

(2) *Elective deferrals.* The term "elective deferrals" has the meaning provided in § 1.402(g)-1(b).

(c) *Effective date—(1) In general.* Except as otherwise provided in this paragraph (c), this section is effective for plan years beginning after December 31, 1987.